Act, 1910. In computing their profit for the purposes of income tax they claimed to deduct, as disbursements wholly and exclusively laid out for the purposes of their trade, the amount of the instalments. On appeal to the King's Bench Division it was held that the sums paid as monopoly value which was imposed as a condition of the grant of a licence were of the nature and quality of capital payments and not deductible. So the subject matter in *Henriksen's case* was payment of statutory charges and it was so different in character from the payment in the present case that we do not think that the decision in that case can be of any help in the present case. Further, it seems that the Special Commissioners did not sufficiently consider the fact that in proper cases as in *Mohanlal's case,* where an exclusive right was acquired what is extracted from the land pursuant to the exclusive right is treated in law as stock-in-trade and the payment made to acquire the exclusive right is taken as revenue expenditure. It does not appear that the Special Commissioners were mindful of the following observation of the Privy Council in *Mohanlal's case*:

"It is true that the rights under the contracts are exclusive, but in such a case as this that is a matter which appears to their Lordships to be of no significance."

We agree with Wan Yahaya J. that the decision of the Special Commissioners should be reversed and therefore we dismiss this appeal, with costs to the taxpayer here, in the High Court and before the Special Commissioners. The relevant assessments of income tax should be varied accordingly.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

NG SIEW WAH & ORS. v. MAA HOLDINGS SDN. BHD. & ANOR.

[S.C. (Salleh Abas L.P., Mohamed Azmi & Abdoolcader S.C. JJ.) March 28 & April 20, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 259 of 1984]

Contract – Sale of shares in company – Specific performance – Written contract – Construction – Correction of typing error in contract.

In this case the appellants appealed against the order of specific performance of a written contract of sale and purchase of all the issued shares of a company. Clause 6 of the Contract relating to the entitlement to specific performance referred to Clause 2 of the Contract, which dealt with the application for approval of the Foreign Investment Committee. The learned trial judge held that there was a typographical error and that the reference should be Clause 3 instead, which dealt with the payment of the balance of the purchase price. No application had been made to the Foreign Investment Committee but the balance of the purchase price had been paid in full. The learned trial judge therefore made the order for specific performance. The appellant appealed contending that there was no typographical error in Clause 6 and that the application to the Foreign Investment Committee was a condition precedent.

Held: the learned trial judge was correct in holding that what the parties had agreed to was to provide by Clause 6 for specific performance in the event of the whole of the purchase price having been paid and not as contended by the appellants to provide for specific performance in the event that approval to the Foreign Investment Committee had been applied for. The learned Judge was correct in his conclusion that as a matter of construction there was an obvious typographical error in Clause 6 and in construing the agreement "Clause 2" therein should read "Clause 3".

Cases referred to :–

(1) *Nittan* v. *Solent Steel Fabrication Ltd.* [1981] 1 Lloyd's Rep.

(2) *Wilson* v. *Wilson* (1854) 5 H.L.C. 39; 10 E.R. 811.

SUPREME COURT.

Mrs. I. de Silva for the appellants.

Raja Abdul Aziz Addruse (*Zainur Zakaria* with him) for the respondents.

T.J. Su holding watching brief for D. & C. Bank Bhd.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): This is an appeal against the order of specific performance of a written contract of sale and purchase of all the issued shares of a company known as Leeng Land Sdn. Bhd. for the sum of $8.1 million. It involves the purchase of land by means of the purchase of shares of the corporation owning the land. The contract was entered into on October 6, 1981 between Encik Zachariah bin Mohd. Tasa (2nd respondent) as nominee or agent of the first respondent, and the five appellants who between them owned all the one million and two (1,000,002) issued shares of the company. The Agreement prepared by Mr. Paul Choong of Shook Lin & Bok as solicitor for the vendors, contained a number of typographical errors which are so obvious that before us counsel for both parties have found it not worthwhile jabbering about. However, in respect of one

of these errors *i.e.* the one in clause 6, the appellants persist in their argument that the error is not obvious and in fact non-existent and as such the learned trial Judge is alleged to have misdirected himself in law in correcting the said clause by substituting the words "clause 2" therein with the words "clause 3" when interpreting the provision. The actual dispute is therefore on the construction of clause 6 which is couched in the following words:—

"It is also further agreed between the parties hereto that if the Purchaser complies with Clause 2 hereof and the Vendors fail to comply with their obligations under this Agreement to complete the sale the Purchaser shall be entitled to specific performance and all other legal remedies and damages available to them or alternatively at the choice of the Purchaser the return of all sums paid to the Vendors without interest."

In construing the Agreement as a whole, it was the finding of the learned trial Judge that the reference in clause 6 to clause 2 was a clear typographical error and that the reference ought to be to Clause 3 instead. Clause 2 refers to a warranty on the part of the purchaser to apply to the Foreign Investment Committee (an administrative body set up by the government to implement the new economic policy) for approval of the sale transaction, whilst clause 3 deals with the manner in which the $6.1 million balance of the purchase price was to be paid by the purchaser towards completing the sale. For the purpose of this appeal, it is important to reproduce these two relevant clauses *in extenso*:—

Clause 2:

"The Purchaser shall forthwith after execution of this Agreement apply to the Foreign Investment Committee for approval of the transaction herein and shall endeavour to obtain such approval within three (3) months from the date hereof. It is hereby agreed that the sale of the said Shares shall not be affected by the late approval or non-approval of the Foreign Investment Committee and all the terms and conditions herein inclusive of the terms of payment shall continue to be effective and binding notwithstanding any late approval or non-approval of the Foreign Investment Committee."

Clause 3:

"The balance of the purchase price amounting to Ringgit Six Million One Hundred Thousand (Ringgit 6,100,000/—) only shall be paid by the Purchaser to the Vendors' solicitors Messrs. Shook Lin & Bok of 21st Floor, Wisma MPI, Jalan Raja Chulan, Kuala Lumpur (hereinafter called 'the Vendors' solicitors') on or before December 31, 1981. At the request of the Purchaser the Vendors shall grant an extension of one (1) month for payment of the balance sum of Ringgit 6,100,000/— together with interest thereon at the rate of twelve per centum (12%) per annum. Provided always that in the event the Purchaser shall require to extend payment of the balance sum for a further period of one (1) month the Purchaser shall pay to the Vendors on or before December 31, 1981 fifty per cent (50%) of the balance sum amounting to Ringgit Three Million and Fifty Thousand (Ringgit 3,050,000/—) for which the Purchaser shall be given an extension of a total of two (2) months to pay the balance sum of Ringgit 3,050,000/— together with interest at the rate of 12% per annum (the date of payment of the balance sum shall be referred to as 'the completion date')".

Before us, it is common ground that (i) the purchaser has not made an application to the Foreign Investment Committee (FIC) and (ii) the purchaser has paid the $6.1 million balance of the agreed purchase price as stipulated in clause 3. This payment ought to be made on or before December 31, 1981 but an extension was agreed upon as provided for in clause 3, and the payment within the extended period is evidenced by the official receipt dated January 23, 1982 issued by Messrs Shook Lin & Bok (see page 131 Appeal Record). The crux of the appellants' argument is that there is no typographical error in clause 6 and that application to FIC is a condition precedent and not merely a warranty to the contract, and since the purchaser has failed to make such application as required by clause 2, he is not entitled to specific performance of the contract as provided for under clause 6. By letter dated March 12, 1982 the appellants had apparently repudiated the contract on the ground of non-application by the purchaser. It is therefore contended that the trial Judge was wrong in holding that reading clause 2 instead of clause 3 in clause 6 was as absurd as doing so in clause 5(a) which stipulates:—

"It is hereby expressly agreed between the parties hereto that if the Purchaser fails to pay any of the instalments within the stipulated time or any extension thereof as mentioned under Clause 2 hereof, the Vendors shall be entitled to forfeit all sums thencetofore paid by the Purchaser to the Vendors and whereupon this Agreement shall terminate and of no further effect and neither party hereto shall have any claim against the other".

Learned counsel for the appellants, whilst conceding the typographical error in clause 5(a) cannot find any absurdity in reading and interpreting clause 6 as it is without any correction. We agree with the argument that merely because reference of clause 2 in clause 5(a) is an obvious error, it does not automatically follow that the same error must be imputed in clause 6. Indeed the finding of the learned Judge is based on interpretation of the Agreement as a whole and not on the alleged Q.E.D. argument.

The question that has to be posed is – Is there an obvious typographical or clerical error in clause 6? Mrs De Silva for the appellants had complained before the trial Judge that the alleged error in clause 6 had not been pleaded and therefore was not an issue before the court. But the learned Judge thought that paragraph 4 of the Reply covered the point. Be that as it may, it is an established principle that rectification is not necessary if there is obvious mistake or misnomer in a document. No court will allow people to take advantage of a misnomer or a typing error when everyone knows what was intended. Thus, in *Nittan* v. *Solent Steel*[1], Lord Brightman, L.J. said at page 639:–

"In my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer. A misnomer is not, in my view, necessarily a mistake which requires the equitable remedy of rectification. The misnomer may be a mere clerical error. A simple example would be the use in a conveyance of the expression 'the vendor' where clearly 'the purchaser' was intended. It is not necessary to rectify the conveyance to enable it to be read and take effect as the parties plainly intended."

Similarly in *Wilson* v. *Wilson*[2], Lord St. Leonards said at page 822:–

"But the question still arises, what is the true construction of the contract? Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes – without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty. ..... There was no question about going contrary to the intention. It was a question of construction. It struck everybody who looked on it that it was a clear error."

In our judgment, the learned Judge is right in his conclusion that there is a clear typographical error in clause 6. The reference to clause 2 instead of clause 3 in that clause would produce absurd result. The whole basis of the appellants' argument is founded on the assumption that clause 2 obligation of the purchaser to apply for approval from the FIC constitutes a condition precedent of the contract. The clear words used in clause 2 must be given their plain meaning. The second limb of clause 2 unequivocably stipulates that the consequences of application or non-application for FIC approval is not fatal, and indeed there is no stipulation that such application is a condition, let alone a condition precedent of the contract. Any "late approval" (which implies that there is no time limit imposed in making the application although the purchaser should merely "endeavour" to obtain approval within three months of October 6, 1981) and "non-approval" (which clearly demonstrates the non-consequential effect of the result of the application) have expressly been agreed by the parties not to affect the Agreement in any way. It is thus the intention of the parties that notwithstanding any late approval or non-approval of the FIC, all the terms and conditions in the Agreement inclusive of the terms of payment of the purchase price shall continue to be effective and binding. In the circumstances, the appellants are not entitled in law to repudiate the Agreement on the ground of non-application as opposed to non-payment of the balance of the purchase price. In the words of the learned Judge at page 7 of his judgment:–

"I find that it is indeed odd that the purchaser could insist on specific performance simply because they had sent in an application for FIC approval when clause 2 itself shows that the parties took the view that the outcome of the application was not important. This entitlement, at the option of the purchaser, for specific performance on the failure on the part of the vendors to complete the sale when the requirements of clause 2 had been met and when the requirement of clause 3 to pay up the balance of the agreed purchase price may not have been met, makes for an absurdity."

In our view the insignificance and immateriality of FIC application in the Agreement must have been known and intended by the parties at all material times. We are informed by learned counsel for the appellants that the first time that the appellants came to know of non-application was around February 4, 1982 when an enquiry was made from Mr. Paul Choong who has since been mercifully discharged by the appellants as their solicitor. As stated by the learned Judge at page 19 of his judgment, "If the defendants were all that concerned about the application for FIC approval, I would have expected them to have made enquiries on the position sometime prior to the completion date January 23, 1982." Indeed under clause 2, the purchaser was supposed to apply to the FIC forthwith after execution of the Agreement and on such application he must endeavour to obtain the approval within three months from October 6, 1981 *i.e.* on or before January 6, 1982. If this stipulation were a condition precedent, then the Agreement would have come to an end by January 6, 1982 since even the application had not been made by the purchaser by that date. Yet the appellants agreed under clause 3 to extend the time for completion of the contract beyond the 3-month period *viz.* to January 23,

1982, and what is pertinent, no question was asked about the application before the appellants agreed to the extension. Clearly therefore compliance with clause 2 referred to in clause 6 is an obvious typographical error, and in order to make any sense to clause 6, the purchaser should be entitled to specific performance only if he had complied with clause 3 which relates to payment of the balance of the purchase price *i.e.* the completion of the sale and not compliance with clause 2 for FIC approval which the parties have expressly intended should not affect the sale and their obligations under the Agreement including the terms of payment of the purchase price. Obviously, non-application does not create a condition which goes to the root of the contract. This interpretation is supported by clause 4 which provides a mandatory requirement that the stakeholders with whom the appellants should deposit the share certificates must release the documents to the purchasers upon full settlement of the balance of the purchase price. Thus, once full payment is effected, the vendors are committed to complete the sale irrespective of whether or not an application for FIC approval had been made and this is what is envisaged in clause 6 that if "the Vendors fail to comply with their obligations under this Agreement to complete the sale, the Purchaser shall be entitled to specific performance and all other legal remedies and damages available to them". In the result clause 3 and not clause 2 should be read in clause 6. The typographical error in our view is too obvious. We are further fortified in our view by clause 11 which provides:—

"The Vendors hereby expressly agree and confirm that as from the date of the Purchaser settling the full balance of purchase price, they shall have no right title interest or anything whatsoever in and to the said Company and the said Shares or any part thereof and the Vendors hereby further expressly acknowledge as from the date thereof the Purchaser is the person entitled to the legal and equitable title and interest in and to the said Company and the said Shares."

The learned trial Judge therefore did not err when he held that what the parties had agreed to was to provide by clause 6 for specific performance in the event that the whole purchase price of $8.1 million had been duly paid and not as contended by the appellants to provide for specific performance in the event that FIC approval had been applied for. Nor did he err in fact or in law when he concluded that since the stipulation for payment of the balance of the purchase price was in clause 3, it would follow that the compliance required by clause 6 had to be a compliance with clause 3 and not of clause 2 which was not material for the completion of the sale. In the result we agree with the learned Judge's conclusion that as a matter of construction there was an obvious typographical error in clause 6, and in construing the Agreement, "clause 2" therein should read "clause 3".

For the above reasons we have dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Chooi & Co.; Zainur & Maydien.*

YAU HENG FANG v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C. JJ.) February 5 & April 22, 1985]

[Kuala Lumpur – Federal Court Criminal Appeal No. 41 of 1983]

Criminal Law and Procedure – Accused originally charged with murder before Judge and jury – Charge amended to culpable homicide not amounting to murder – Jury discharged and case heard by Judge alone – Common intention – Identification of accused as one of assailants – Testimony on issue of identity inherently incredible – No prima facie case – Defence of alibi – Burden of proof – Appeal – Power of appellate court to interfere – Penal Code, ss. 34, 302 & 304 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 220, 210, 232 & 402A.

Evidence – Defence of alibi – Burden of proof – Criminal Procedure Code, (F.M.S. Cap. 6), s. 402A.

In this case the accused had been convicted on a charge of culpable homicide not amounting to murder with three others still at large under the first limb of section 304 read with Section 34 of the Penal Code and sentenced to 10 years' imprisonment. He appealed against conviction and sentence. The appellant had originally been charged for murder under section 302 of the Penal Code and tried before a judge and jury. The charge was reduced to culpable homicide not amounting to murder and the jury were discharged and the appellant tried by a judge alone. The main grounds of appeal were (a) that the trial was a nullity on the ground that the appellant having been given in charge to the jury in accordance with section 210 (ii) Criminal Procedure Code, the remaining provisions of Chapter XII of the Code including the requirement for the jury to return a verdict was never complied with and as such the appellant was not lawfully convicted and sentenced; (b) the identity of the appellant and the rejection of the defence of alibi by the learned judge.

Held : (1) as a matter of established procedure the jury were properly discharged in this case when the murder charge was amended to culpable homicide not amounting